

THE
ARGUMENT
OF THE
Lord Chief Justice
OF THE
Court of King's Bench
CONCERNING
The GREAT CASE
OF
MONOPOLIES,
BETWEEN
The EAST-INDIA Company, *Plaintiff*,
AND
THOMAS SANDYS, *Defendant*.

Wherein their Patent for Trading to the *East-Indies*, Exclusive of all others, is adjudged good.

Entred Trin. 35 Car. 2. B. R. Rot. 126. and Adjudged *Termino*
S. Hilar. amis 36 & 37 Car. 2. & *Primo fac.* 2.

L O N D O N,

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ARGUMENT

and Chief Justice

out of King's Bench

THE GREAT CASE

MONOCLIES



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XIX

The Publisher to the Reader.

TO commend this Argument I'll not undertake, because of the Author; but yet I may tell you what is told me, That it is worthy any Gentleman's perusal, for the Subject is of concern to the Publick in general, and to every individual Man in the Kingdom either immediately or by Consequence, since Trade is the Life of a Nation, and all Men are Traders either by themselves or others; the Consequences of it are Strength, Wealth, and Employment to all sorts of People whatsoever: And that, and nothing but that, can secure the Peace of the Country, it employing both Rich and Poor, and keeping all from Idleness, and so prevents Ill Men from disturbing the Government by Treasons, or the Subject by Felonies, both which are most frequent when Trade is dull, and Men are Idle; when the Exchange is thin, and Shops are empty.

'Twould be an endless Task to recount the Desolations and Ruins that have happened to States and Kingdoms by Sloth, Luxury, Idleness, and the neglect of Commerce, and the prodigious Benefits that have accrued to several Countries by the contrary, and to our own in particular; and the vigilant Care and Zeal, which wise Kings, Princes, and other Sovereign Potentates, have always had and used for the Countenance and Promotion of Traffick, within their respective Territories.

That Foreign Trade is of absolute necessity, and infinite advantage to England, is as apparent as that we are an Island peculiarly adapted, and prepared for it by Nature her self; insomuch that Shipping, which at first was an Invention of the Deity, for the Use of Noah and his Family, seems a Blessing design'd, most particularly for us, to render us sociable with the Inhabitants of Foreign Countries, that we might borrow of their Necessities, and vent our own Superfluities to them instead of it; and so maintain a Correspondence with all the habitable World.

That Foreign Commerce cannot be advantageously maintained without Societies instituted for that purpose, is sufficiently manifested to all considerate Men, from the Policies of other Laws abroad, which establish them, and from the Provisions of our own, which allow and protect them, and from the necessity of the thing it self, as appears by the vast Charge, (in Intelligence, Factors, Castles, Forts, Men, Arms, &c.)
and

To the Reader.

and the wise Conduct requisite for the support of such a Commerce, which without the united Aid of a considerable number of understanding Merchants, upon a considerable Stock; must necessarily be obnoxious to the growing Incroachments of neighbouring Countries, (which use the Policy of settled Companies) and to the other mischievous Casualties, that may daily happen through the Indiscretion and Rashness, and other weakness in Stock or Conduct of particular individual Persons, exercising such Traffick.

As for the East-India Company, they support the Crown by the incredible Customs, which are yearly paid by it; they bear a considerable Proportion of publick and necessary Subsidies; they enrich the Nation by their Importations; they Convert Infidels, or at least civilize them, and make them more humane by their Correspondencies; they employ vast numbers of Poor People; they negotiate vast Sums of private Persons Monies, which would otherwise lie dead or useless: They educate and breed vast numbers of Sea men for the Services of War; they build and employ Vessels of great Burden, useful to the Crown and Publick upon emergent Occasions: Their Naval Force is part of the Defence of the Kingdom; their Trading Fleet, is both the Glory and Riches of the Nation; they have improved and do maintain the Spirit of Commerce to that degree, as preserves the Balance of Trade between us and our Neighbours in its just Proportions; which Company, were it dissolved, their Trade and Strength would increase, and ours decay, and we should be reduced to our Primitive State of Self-subsistence, and our Merchants, (now the Pride of England, and the Envy of the World) must become Domestick Pedlers, for an home ignoble Traffick from Cities to Towns, and from Towns to Villes, & sic retrorsum: For these Reasons is the ensuing Argument published.

(1)

THE
A R G U M E N T
OF THE
Lord Chief Justice *Jeffreys*,
Concerning the Great CASE of
M O N O P O L I E S.

P L E A.

I. **D**efendant demands *Oyer* of the Letters Patents which are set forth *in hæc verba*. In which (as it hath been observed) the penalty of Forfeiture of Ship and Goods, one moiety to the King, and the other to the Company, and Imprisonment is omitted.

II. There is also a Clause, that the Company may License Strangers or others, and that the King will not without the consent of the Company give Licences, &c.

III. That none shall have a Vote in the General Assembly but he that hath 500 *l.* Stock.

IV. And there is another Clause which hath not been mentioned by the Council on either side, that if it should hereafter appear to his Majesty or his Successors, that that Grant or the continuance thereof shall not be profitable to his Majesty, his Heirs and Successours, or to this Realm, that after three years warning under the Privy Seal or Sign Manuel, the same should be utterly void.

For Plea, the Defendant says by an Act of Parliament made 15 *E. 3.* It is enacted, that the Sea shall be open for all Merchants to pass with their Merchandizes where they please, and that the Defendant by vertue of that Act, and according to the Common Law of *England* did Traffick within those places mentioned in the Declaration without any Licence, and against the will of the Company as the Plaintiffs have declared *pro ut ei bene licuit*.

Plaintiff Demurs.

In the debate of this Case at the Bar there were several matters discoursed of, but at length by the consent of both sides, as I apprehend, the Case was resolved into these two Points.

I. Whether these Letters Patents giving or granting Licence or Liberty to the Plaintiffs to exercise the sole Trade to the *Indies* within the limits of their Grant, with prohibition to all others, be good in Law.

II. Admitting the Grant good, whether this Action be maintainable for the Plaintiffs.

A

Now

Now to let me into the Debate of these two Points: I think not amiss to remember some things that have been mentioned by the Counsel that I think are no ways in Question.

I. At this time I conceive therefore, that whether the King may prohibit his Subjects from going beyond the Seas by Writ, or otherwise, by his absolute Prerogative without giving any reason, is not the Question, nor sure was it ever thought a Question till it was lately stirred at the Bar. For the Writ in *Fitz. N.B.* 85. and the Register import no such thing, and our Books say, the Surmises mentioned in those Writs are not traversable: so is *Dyer* 165. & 296. for surely the King may restrain his Subjects from going beyond Sea, and is not bound to give any reason for his so doing; but that is not now in Question.

II. In the next place, I do not conceive there is any difference (tho much discourse hath been about *Indians* and *Infidels*) whether the *East-Indies* were at the time of the Grant of this Patent inhabited by Christians or Infidels; tho by the way in the debating of this Case, I shall shew, perhaps that matter may in some measure affect the Defendant, but will not at all affect the Grant to the Plaintiffs. So that I conceive that whether this Country or Place, or any other be inhabited by Christians or Infidels that is not otherwise provided for by Act of Parliament, will make but the same Question.

III. Whether every Clause and Article in these Letters Patents, *viz.* Touching forfeiture of Ship and Goods, Imprisonments, or divers other clauses contained in the Charter be legal or not, is not now in question. For surely it would be hard to maintain them all, and therefore the Plaintiffs Counsel have avoided those Questions by bringing this Action; and tho the Defendants Counsel have mentioned them, yet surely it was onely intended to sully the Cause, and not that they thought them to affect the Question.

IV. Nor is it the Question, Whether by this Grant to the Plaintiffs the King has fettered or confined his Prerogative by putting in a Covenant to exclude himself from granting Licences to others of his Subjects to trade within the limits of the Plaintiffs Charter; tho Mr. *William's* (always a friend to the Kings Prerogative) in tenderness and care thereof seemed to be surpris'd by the inconsiderate extravagancy of the Grant, and would have us believe that he was afflicted with the dismal Consequences that must necessarily ensue by the King's parting with so great a Prerogative, and that either by the advice, consent, or the inadvertency of his Attorney General and the rest of his Council, by having a greater regard to the *East India* Company for the sake of their Money than they had to the King in discharge of their duty. To acquit them and us therefore of that Dilemma, I am of opinion, though it makes nothing to the question that is now before us: The King may grant Licences to any of his Subjects to trade to the *Indies* notwithstanding the Charter or any Article, Clause or Condition therein contained to the contrary, and notwithstanding any Caution or advertisement that in his argument he gave to the King, or his reflection that he made upon his Council either for their ignorance or hasty inadvertency in the passing of that Grant; and I am the rather induced to be of that persuasion, for that the most learned of our Profession whose Opinions have been quoted by him and others that have argued on the Defendants

endants side were then of the Kings Council, and were privy to, and advised both these Letters Patents and all others of the like nature that have been granted for these hundred years last past. I therefore think fit to say, that I believe Mr. Attorney General, and the rest of the King's Council have discharged their Duty as well to the King, by maintaining of this Grant, as Mr. *Williams* has in this instance manifested his Loyalty by endeavouring to destroy it. In short therefore, as I said before, every Clause in this Charter is not to be maintained, and therefore is not to affect the Question now to be determined.

V. Whereas it has been objected, that tho upon the Pleadings it is agreed, that the Defendant never was a Member of the *East-India* Company, nor had any Licence from them to trade to the *Indies*, yet he might have a Licence from the King, which, as I conceive, the King is not debarred to grant by any Clause in the Letters Patents; yet I am of opinion, that if the Defendant had any such License, it ought to have been shewn on his part, which not being done, it ought to be taken by us, as I believe the truth of the Fact is, the Defendant never had any such Licence.

VI. It was observed, that the Plaintiffs in their Declaration had alleged, that this Trade could not be managed but *per hujusmodi Corpus Corporatum*; and by this means they had excluded the King from Constituting any more Companies to trade within their Limits, tho perhaps the advantage of this Kingdom might hereafter require it: Nay, tho the *Indians* might desire a further Treaty of Commerce, or that the Trade of these places might require more Companies to be erected; yet say they, this Grant hath made the Plaintiffs a mere Republick, and thereby has altered the Constitution of *England* in the management of Trade by Common-wealths, by placing it in Companies, who (were they Independant upon the Crown) are truly so called. Yet in as much as I did before observe, that the King is not by this Grant either excluded from making any new Treaties with the *Indians*, or from making any Corporations or granting any other Licences to any of the rest of his Subjects, notwithstanding any of the Clauses in the Charter: So I am of opinion, that that Objection also does not affect the Question now to be determined, and for that reason amongst others, I thought it not improper to mention that Clause in the Charter that was omitted at the Bar, which the King has annexed as a Condition to his Grant, that if it should hereafter appear, to his Majesty or his Successors, that that Grant or the continuance thereof in the whole or in any part, should not be profitable to his Majesty, his Heirs and his Successors, or to this Realm, that after three years warning by War, under the Kings Seal or Sign Manual, should be made utterly void. So that it appearing that the King hath neither divested himself of the power, nor at the time of the Grant did design to be prevented to shew his inclination for the promoting of the advantage of his Kingdom, has given himself scope enough to obviate all those Emergencies. Yet by the way I cannot but observe, that Mr. *Williams* to shew his dislike to a Commonwealth, declared it to be absolutely opposite to the interest of a Single Person, but the Single Person he concerned himself for was not the King and his Prerogative, but his Client the Defendant, and his Trade, who tho I cannot in propriety of Speech call a Commonwealth; yet I cannot

but think this opposition of his seems to proceed from a Republican Principle; for he by his Interloping has been the first Subject that within this Kingdom for near an hundred years last past, hath in *Westminster-Hall* publickly opposed himself against the King's undoubted Prerogative in the Grant now before us; and I hope by this Example the rest of his Majesties Subjects will be deterred from the like disobedience.

There were some other superfluous Objections made against the Clauses in the Charter, and against the Formality of the Pleadings, which I think not necessary to remember, and therefore having thus premised, I shall now descend to those Points I think only material in this Cause.

I. The first and great Point in this Cause, is, Whether this Grant of the sole Trade to the *Indies*, to the *East-India* Company exclusive of all others, be a good Grant in Law or not, and I am of opinion it is, and by the way I cannot but make the same remark in this Case as my Lord Chief Baron *Flemming* made in the great Case of *Bates* in the *Exchequer, Lane*, fol. 27. that it is a great Grace and Eminent Act of condescension in the King to this Defendant, that he does permit this great Point of his Prerogative to be disputed in *Westminster-Hall*; but by this he does sufficiently signifie to all his Subjects, that he will persist in nothing, though it seem never so much for his advantage, but according to the Laws of the Land. I shall therefore endeavour to make it appear that he is invested with this Prerogative by the Law of this Nation; But by the Law I do not only mean the customary Common Law or Statutes of this Realm which are Native and peculiar to this Nation, which as Mr. Attorney well observed are not adapted to this purpose. But such other Laws also as be common to other Nations as well as ours, and have been received and used time out of mind by the King and people of *England* in divers Cases, and by such antient Usage are become the Laws of *England* in those Cases; namely, the General Law of Nations, the Law-Merchant, the Imperial or Civil Law, every of which Laws so far forth as the same have been received and used in *England* time out of mind, may be properly said to be the Laws of *England*.

And for the better communicating my Thoughts upon this Subject, I will proceed by these Steps:

1. I will very briefly consider of the Inland Trade within this Kingdom, and the Foreign Trade with other Nations, and therein observe that the King's Prerogative is concerned in both, and that there is a great difference between both allowed by the Municipal Laws of this Kingdom.

2. I shall shew that the Liberty of Foreign Trade may be restrained.

3. That Foreign Trade and Commerce being introduced by the Law of Nations, ought to be governed and judged according to those Laws.

4. That by the Laws of Nations the Regulation and restraint of Trade and Commerce is reckoned *Inter Juris Regalia*, i. e. the Prerogative of the Supreme Magistrate.

5. That though by the Laws of this Land, and by the Laws of all other Nations, Monopolies are prohibited, yet Societies to trade, such as the Plaintiffs, to certain places exclusive of others, are no Monopolies by the Laws of this Land, but are allowed to be erected both
here

here and in other Countreys, and are strengthened by the usage and practice of both, in all times.

6. I shall shew the Authorities that are extant in our Books, together with such Presidents, Reasons both publick and politick; for as my Lord *Fleming* says, that such Reasons are good directions for our judgments in such Cases as these; being demonstrations of the course of Antiquity; and therein also observe the necessity and advantage of such Societies, and by the way endeavour to answer the several Acts of Parliaments, Presidents and Authorities, with all other the objections that have been made against my Conclusion.

1. First then, to consider the difference between the Inland and the Foreign Trade allowed of in our Books, and that the King's Prerogative doth affect both. As to Manufactures under which all sorts of Artificers are concerned, I think they remain with the most Liberty by the Common Law; and as Mr. Attourney observed, the Publick-weal is little concerned therein, only to preserve every one in the quiet enjoyment of the fruits of his own labour and industry, yet even in that the King's Prerogative hath not been totally excluded; for as it is taken notice of in our Books, that all things that are this day enjoyed by Custome or Prescription, had their Commencement by Royal Grant, and by that means no Artificer within the City of *London* can at this day use two Trades, *i. e.*, a Carpenter cannot use the Trade of a Joyner, or a Bricklayer of a Plaisterer.

2. As to the Trade of Merchandize or Inland Commerce generally speaking, it had the next Freedom by the Common Law, but was subject nevertheless to be limited or restrained by the King's Prerogative in several particulars. As for instance, to prevent all forestalling and ingrossing.

So Mr. Attorney did well observe, that numbers of people could not meet to traffick or Merchandize without being in danger of being punished as unlawful Assemblies, the Crown therefore granted the liberties of Fairs and Markets for the sake of Commerce and Trade; all which did originally proceed from the Crown, and therefore by abusing those liberties may still be forfeited to the Crown; and passing by all other instances, I shall only instance one taken notice of in our Books, which well considered may go a great way in the Case at the Bar. Register, fol. 107.

The King grants to the Abbot of *Westminster* and his Successours, that they should hold a Fair at *Westminster* thirty odd days together, with a prohibition that no Man should buy or sell within seven Miles of that Fair during that time, and the King does there command the Sheriffs of *London* by his Writ to seize the body of an Inhabitant of *Salisbury* for selling Cloaths in *London* within the time of the Fair: Now here is a Charter granted to a particular Person exclusive of others, for a time subject to more Objections than the Charter now in Question, yet approved of by our Books.

Hence it came that Corporations were erected, and Trade confined to Places and Persons exclusive of others; for all such came originally from the Crown, and as I said before in the Case of Fairs, so I may now say in the Case of Corporations, that though they claim Liberties and Privileges by prescription: yet these originally proceeded from the Crown, and are therefore forfeitable to the

Crown, an Eminent instance hereof is that great Case of the City of London for abusing their Liberties, which they claimed by prescription confirmed by divers Charters and Acts of Parliament by Judgment of this Court, their Liberties and Franchises were seized into the King's Hands, and therefore remain as a Vill to all intents and purposes till his Majesty shall be pleased of his Bounty to restore them.

Now that the Inland Traffick is most concerned either in Corporations, Markets or Fairs which all proceeds from the Crown, does plainly evince that the King's Prerogative has a more immediate influence over Dealings in Merchandizes than it has over other Mechanick Crafts and Mysteries; and that as Mr. Attorney did well observe to prevent Frauds, Deceits and other abuses either in Weight, Measures, or otherwise, which would certainly interrupt such Commerce; but our Law goes yet a Step further, and allows further difference between Inland Merchandize and Forein, and allows a different way of determining Controversies that arise thereupon, the Common Law and Statutes of this Realm allowing the Law-Merchant, which is part of the Law of Nations, should decide such Controversies to. *Decimo tertio H. 4. fol. 19.* a Complaint made to the King and Council of some goods taken away from a Merchant; it was moved in that Case, that the matter might be determined at the Common Law, but the Lord Chancellour said, that the Suit being brought by a Merchant who is not bound to sue according to the Common Law to have his Cause tried by twelve Men, and to observe the other Solemnities of our Law, but shall sue in *Chancery* according to the Law of Nature, which is the Universal Law of the World. And it is in that Case agreed by all the Judges, that if Forein Merchandize were stoln or waived, they could not be seized as other *England* Merchandizes might be by the Rules of the Common Law, as Waifs and Strays, which shews plainly there is a difference in the consideration of our Law between forein Merchandizes that cross the Seas, and other Inland Goods and Commodities. If two Merchants be Partners in Merchandizes, one shall have an Action of Accompt against the other *secundum Legem Mercatoriam*, says the Register, *fol. 135.* and *F. N. B. 117. D.* and yet by the Rule of the Common Law, if two Men be jointly possessed of other Goods which are no Merchandize, the one cannot bring an Action of Accompt against the other, if one of the Merchants dies, the Executor may bring his Accompt against the Survivor for his moiety. *Reg. 135. F. N. B. 117.* but if it were a Copartnership for other Goods, it would survive *per Jus accrescendi* according to the Rules of the Common-Law.

In an Action of Debt upon a Simple Contract, the Defendant may wage his Law, but it is otherwise in a Contract about Merchandize in *Lane's* Reports, *Bates's* Case agreed, *Reg. 260. A.* At Common Law, the Goods of Ecclesiastical Persons were excused from Toll; but says the Writ *dum tamen Merchandizas aliquas non exercitat de iisdem*, it shews that then they fall under another consideration; if one Man wrongs another Man of his goods, here an Action of Trespas will lie; but if a Merchants goods be taken upon or beyond the Seas, there must be a Writ of Reprizal to obtain Satisfaction, the Parliament Roll, *3 Ed. 1. M. 19. in Archivis Turris Londini*, where the Bayliffs of *Soutbampton* are commanded by Writ, *quod omnes Mercatores Leodienses ad partes Angliæ accidentes*

accidentes per bona & Catalla sua distringantur secundum Legem Mercatoriam & Consuetudinem regni ad satisfaciendum Mercatoribus Florentinis, &c. Where by the way observe, that *Lex Mercatoria*, which differs from the ordinary Common Law, is said to be *Consuetudo regni Angliæ*, by which we may observe, that Forein Merchandizes and Traders differ from others in the Eye of Law, even by the allowance of the Common Law it self.

Several Acts of Parliament have been also made for the more speedy Recovery of Debts contracted for Merchandizes, as the Statute of *Action Burnel*, the Statute *de Mercatoribus*, and the Statute *Vicesimo Septimo, Ed. 3. Cap. 2.* Amongst other things it is enacted, That for Merchandizes taken away, the Party shall be arrested, and speedy and ready Process shall be against him from day to day, and from hour to hour according to the Law Merchant, and not at the Common Law. So the Statute for erecting the Court of Ensurance designed for the speedy ease of Merchants, has left the determination according to the Law of Merchants, and therefore hath ordered the Judge of the Admiralty's Court always to preside in those Commissions: by all which I think I may fairly conclude there is a great difference allowed of between the Inland and Forein Commerce; and that,

II. I shall endeavour to prove that the Liberty of Forein Trade may be restrained.

And here I must premise, that as at first all Things were promiscuously common and undivided to all, so the free Exercise of this Universal Right was then instead of Property; but as soon as the number of men increased, and they found by experience the inconveniency of holding all things in common, things were reduced into Property by agreement and Compact, either Express as by Partition, or implied by *Primier Occupancy*.

After this Government was established, and Laws were made even for the ordering those things to which no man had any Right. As for Example, Deserts, Places uninhabited, Islands in the Seas, Wild Beasts, Fishes and Birds, the former were usually gained and disposed of by him that had the Sovereignty over the People; the latter by him that had the Dominion over the Lands and Waters, who might forbid all others from Hunting, Fishing, &c.

And in Vertue of this Universal Law, his Majesty and his Predecessors have always disposed of the several Plantations abroad that have been discovered or gained by any of their Subjects, and may do for the future in case any other be discovered and acquired. For tho the Laws of Nations can command nothing which the Law of Nature forbids: yet they may bound and circumscribe that which the Law of Nature leaves free, and forbid that which naturally may be lawful. Now to apply this to our present purpose of Trade and Commerce, Mr. Williams quoted that common saying, *Commercia debent esse libera*, from whence he infers, that by the Law of Nature and Nations, the Sea and Trade, and Traffick ought to be free as the Air, and for that he has cited *Grotius de Jure Belli ac Pacis, Cap. 3. Wellwoods Abridgment of Sea-Laws*, in his Epistle to the Lord Admiral; *Grotius de Mari libero*, where he says, *Mare & Littora Maris Jure Gentium sunt communia*. Britton, Cap. 33. *De perchase le mere & le air sunt thores Common*. Sir John Burrough

rough his Sovereignty of the Seas. *Baldus de rerum Dominiis*. But I think none of those Books can warrant his conclusion, for surely that Expression *Commercia sunt libera*, cannot possibly be understood in such a literal sense, that every man in every Nation should be at liberty to trade either in what Commodities, or to what place or at what time soever he shall think fit; for I took it to be granted by all that argued for the Defendants, that Trade and Commerce must be subject to some Laws; and *Grotius* in his Book *de Mari libero*, proposes this main design to prove, that any one Nation had not power to hinder another Nation from free Commerce, and that the *Spaniards* therefore had no right to prohibit the *Dutch* from trading into such part of *Indies* whereof the *Spaniards* were not possessed, upon pretence that they had the Dominion of those Seas, *Inter Nos & Hispanos*, says he, *hac Controversia est, sitne immensum & vastum Mare regni unius nec maritimi accessio? Populone unquam jus sit volentes populos prohibere ne vendant, ne permutent, ne denique commeent inter sese*; and for the benefit of his Countrymen he doth therefore assert, *licere cuivis genti quamvis alteram adire cumque ea negotiare*, which, taking that to be true which by the Law of Nations is certainly otherwise: yet nothing can be inferred from thence but onely the Question of Commerce between one Nation and another, and how that was before Leagues and Treaties were made, little may perhaps be found, as Mr. Attorney well observed, besides the Laws of Hospitality, which do not give any Demandable Right; but surely *Grotius* there hath no particular respect to particular Subjects of this or any other Nation, how far the Supream Power of any Nation may erect a Society of Trade to a certain place, and for certain Commodities exclusive of all other Subjects of their own.

And that plainly appears both from the Scope of his Book, as also for that for several Years both before and at the Time of publishing that Treatise, the *Dutch East-India Company* was established, which I shall have farther occasion to discourse of by and by. As for *Welwood's* Epistle, I have seldom observed that Epistles have been cited in *Westminster-Hall* as Authorities: yet supposing it to be so, that all loyal Subjects shall have their Petition granted to Safety and Security in their Trade; I suppose *Welwood* little dreamt of Interlopers, when he talked of loyal Subjects, if it can be meant only of such who may trade by Law, that is, to beg the Question in respect of the Plaintiff and Defendant: as to that of *Britton* that the Sea is common, it is answered, by what hath been said before. And *Welwood* Page 66. says that by *commune* or *publicum* is meant a thing common for the Use of any one sort of People, according to that saying, *Roma communis Patria est*, but not for all of all Nations; *Welwood* page 66. That Passage of *Burrough* is only observed to prove the Kings Prerogative within the four Seas. And though Mr. *Williams* would have insinuated, as the Sturgeons and other great Fish and Wrecks and the like had come to the King by the Statute of the 17. E. 3. C. 11. that Act was but a Declaration of the common Law, for he had it by the Right of his Prerogative, *Plowden's Commentaries* in the Case of Mines, *Cook* 5. Sir *Henry Constable's* Case; these things were vested in the King by his Prerogative by the common Law, yet I cannot but observe that the Treatise of *Mare liberum* on which Mr.

Williams so much relyed, was craftily writ to overthrow the King's Prerogative in that beneficial Part thereof, relating to the Fishing on the English Coasts; and contains a plain Proclamation for all Persons of any Nation indifferently to Fish in all kinds of Seas, for says cap. 5. fol. 10. *quæ autem Navigationis eadem Piscatus habenda est ratio, ut communis maneat omnibus*; and herein though Mr. *Williams* intends to make good the Premises; I presume that Mr. *Pollexfen* that argued on the same side, has a greater concern for his Friends in the *West* than to join with him to make good that conclusion. And before I go off from this Point, I think it not amiss, the better to clear the way to my conclusions, to give some Instances wherein other Nations as well as our own, have not onely thought it legal, but necessary for their several publick Advantages to put restrictions upon Trade, and did not think it injurious to natural Equity, and the Freedom of Mankind so much discoursed of on the other side. To give some few instances: *Videmus Jura Commerciorum*, says *Bodin de Repub. lib. 1. chap. 7. Non solum omnibus populorum principumque inter se conventis, verumetiam singularum Statutis, &c.* And after he has enumerated the Compacts for Trade between the Pope and the *Venetians*, between the Citizens of the *Hantz Towns*, and the Kings of *England, France, Spain*, and several other Countreys: *illi*, says he, *inter se commercium multis modis personarum, mercium, locorum, temporum atque omni aliâ Ratione coarctarunt.* So is *Marguardus*, fol. 155. and *Buchanan* in his 7th Book *de rebus Scotiæ*, and in all Countreys the Importation and Exportation of some Commodities, are prohibited, as Salt from *France*, Horses from other Countreys, Wool from hence. In whomsoever that Power of restraint does remain the Power of Licencing some and restraining of others surely does also remain by parity of Reason; but of that more by and by: and as Mr. Attorney did truly observe upon perusal of the Statutes that are now in Print relating to Trade, the Parliaments have in all Ages even to this Kings Reign since his Restauration, thought fit to make more Laws to prohibit forein Trade than to encrease it, as looking upon it more advantageous to the Common-weal. And thus having observed that other Nations as well as we have not onely thought it legal, but necessary to make Laws for the restraint of Trade, and thereby thought they did no injustice to the Liberty of Mankind,

III. I proceed to the next Step. I shall therefore thirdly, endeavour to prove that Forein Trade and Commerce being introduced by the Laws of Nations, ought to be governed and judged according to those Laws, and I do not know of any Statute or Book of the Common Law now in Print that doth oppose this Assertion, *Cokes 3. Inst. fol. 181.* in the Margin cited by the Defendants Council at the Bar; *Commercium*, says he, *Jure gentium esse debet*; nay, it is the Express Text of the Law, *ex Jure Gentium Commercia sunt instituta*, which being laid down as undeniably true, and so admitted to be by the Defendants Council; I would infer from thence, since Commerce and Traffick are founded upon the Law of Nations by the natural reasons of things, all Controversies arising about the same, should be determined by the same Laws, especially where there is no positive and express Law in that Countrey where such Controversies do arise to determine them by. And Mr. *Williams* seems to allow, that these are

no such Laws in this Kingdom, for he thinks that the Controversie now before us is not to be decided, but by Parliament.

All other Nations have governed themselves by this Principle, and upon this ground stands the Court of Admiralty in this Kingdom, viz. that there might be uniform Judgments given there to all other Nations in the World in Causes relating to Commerce, Navigation, and the like; and in as much as the Common and Statute Laws of this Realm, are too straight and narrow to govern and decide Differences arising about Foreign Commerce, and can never be thought to bear any sort of Proportion to the universal Law of all Nations, as the Interests of all Foreign Trade, do necessitate them to contend for: It will become us that are Judges in *Westminster-Hall*, for the better determining this Case, to observe the Methods used by our Predecessors in determining such like Causes, and take notice of the Law of Nations.

The Common Law, by the several Authorities I cited before, takes notice of the Law-Merchant, and as the Book of *Ed. 4.* before cited, says it is part of the Law of Nations, and leaves the determination to be according to that Law, the several Acts of Parliament I before cited, make a particular Provision, that matters of this nature should be determined according to the Law-Merchant, which is part of the Law of Nature and Nations, and is universal, and one and the same in all Countries in the World, and therefore *Cicero* speaking of this Law, says, *Non erit alia Lex Romæ, alia Athenis, alia nunc, alia posthac, sed & inter omnes gentes & omni tempore una eademque lex obtinebit*; and I the rather thought my self obliged more industriously to search into the Law of Nations, the better to enable me to give Judgment in this Case, the Consequence whereof will affect the King's Subjects in all Parts of the World, and I was minded thereof particularly, by my Lord Chief Baron *Flemming*, in the giving Judgment in the great Case of *Bates* about the Imposition upon Currants, *Lane fol. 27.* and does not only affirm it as necessary, but the common Practices of all Judges in all Ages.

Do not we leave the determination of Ecclesiastical Causes to be decided according to the Ecclesiastical Laws, Foreign Matters, Matters of Navigation, Leagues, Truces, Embassies, nay, even in the Case at the Bar, the stopping of the Defendants Ship by an Admiralty Process, was left by the Opinion of all this Court, and afterwards by the Courts of *Common-Pleas* and *Exchequer*, to be decided in the Admiralty, and by virtue of a Process out of that Court, his Ship is detained to this day; and as I said, that Court proceeds according to the Law of Nations, and the Matters before specified, are not to be controled by the Rules of the Common Law.

And if Customs make a Law, then the Custom of Nations is surely the Law of Nations, which brings me to my next particular, which is the main thing upon which this Cause will turn.

Therefore, 4^{thly}, I conceive, that both by the Laws of Nations, and by the Common Law of *England*, the Regulation, Restraint and Government of foreign Trade and Commerce, is reckoned *inter Jura Regalia*, i.e. is in the Power of the King, and 'tis his undoubted Prerogative, and is not abridged or controled by any Act of Parliament now in force.

This

This Question is not concerning the Consequences of this Power, or any Inconveniences that may happen thereupon, because upon Inconveniences arising, the King is to be supplicated to redress them, which I shall farther take notice of, when I come to answer the particular Objections made against this Grant.

Commerciorum Jura sunt Privilegiata ac non nisi iis concessa qui exercendorum Mercatorum licentiam Principis indultu & autoritate mernerunt, is the very express Text of the Civil Law, and so is *Carpzovires, Const. n. 5. Bodinus de Republica, lib. 1. Cap. 7.* says *quæ tametsi Jure gentium esse videantur prohibere tametsi sæpe à Principibus videmus*, and in Cap. 6. quoted by Mr. Attorney, That the Laws of Commerce are contained in the particular Compacts and Agreements of People and Princes. So *Salmasius* pag. 236. *Mercatura est Res indifferens in qua Magistratus vel in vetando vel permittendo suam pro Commodo Reipublicæ potest imponere Autoritatem.* So *Carpzovires*, a famous German Lawyer in his *Decisions lib. Decis. 105. N. 13. & 14. Exempla haud rara sunt ubi Privilegio & edicto Principis commercia ad certas Personas certave loca restringere videmus*; These Rules and Principles asserted to be the Laws of Nations, agree with the Principles of our Laws; Mr. Attorney in his Argument in this Cause cited many Records and Presidents to make good this Assertion, which I think he did with great clearness: I therefore will content my self with as few of them as I can, and only remind you of such as I think absolutely necessary to make good my Assertion, which I will do by these steps.

I conceive the King had an absolute Power to forbid Foreigners, whether Merchants or others, from coming within his Dominions, both in times of War and in times of Peace, according to his Royal Will and Pleasure, and therefore gave safe Conducts to Merchants Strangers to come in in all Ages, and at his Pleasure commanded them out again by his Proclamation or Order of Council, of which there is no Kings Reign without many Instances; and the Statute of *Magna Charta*, Chap. 30. so much insisted upon by the Defendants Council, is but a general safe Conduct; *Omnes Mercatores nisi publice ante prohibiti fuerint habeant saluum & securum Conductum, &c.* Where by the way I must observe, That *Mercatores*, says my Lord Cook, in his Comment upon the Chapter, is only intended of Merchants Strangers, for I cannot find, that in those days any of the Subjects of this Kingdom did apply themselves to foreign Trade, or at least the Trade was not so considerable, as to be taken notice of in any Book or Record that I can meet with; and before the making of that Statute, my Lord Coke 2. *Institut. fol. 57.* does agree, that the King might and did prohibit Strangers at his pleasure: But he conceives, and with great respect be it spoken to his Memory; I think, without any colour of Reason, would make these words, *nisi publice prohibeantur*, to intend only a Prohibition by Parliament; and his Reason is, for that it concerns the whole Realm: Now did the coming in of Strangers concern the Realm, after the making of the Act, more than it did before? Surely no. Doth not the Power of making War and Peace absolutely belong to the King by his Prerogative? and is not that of publick concern to the Kingdom? and is not the Prohibition of Strangers, a natural dependant upon that Prerogative? if the word *publice* there had been out, there had been no colour

colour for that conceit, and surely the King's Proclamation will make the matter as publick as an Act of Parliament can do; nay, and I may say, more, for Acts of Parliament anciently were made publick by Proclamation; for in our Books we have many Instances of Writs directed to Sheriffs of Counties, to cause Acts of Parliament to be published by Proclamation, and so was the constant and ancient usage; and it is not more natural for Strangers that are abroad to take notice of the King's publick Edicts, which is known to be of great Importance in all Countries, more than they would of an Act of Parliament, that affects the King's own Dominions only; besides it appears more impertinent, if you turn those words into a Proviso, and then it will amount to no more in plain *English* than this, provided, that this Law shall continue, except it be hereafter repealed, which surely would be very ridiculous.

Mr. *Attorney* and Mr. *Solicitor*, both in their Arguments, quoted several Records and Precedents, where the King in all times after the making of that Act, did prohibit Strangers from coming in, and did command them out when they were here at pleasure; I shall not trouble you with the Repetition of the Records, for they were many: Nay, the King, when Acts of Parliament had prohibited, did grant safe-Conduct, and of that sort, in *Rolls Prerogative* 180. you will find several Instances, and in the several Acts of Parliament, cited by Mr. *Attorney*, to confirm the King's Prerogative, as to safe-Conducts it doth appear. *Sydersyn, fol. 441.* It is said, that the King, by the Common Law, might prohibit the Importation of Foreign Goods; and whoever acted against such Prohibition, forfeited his Ship.

The King might prohibit any of his Subjects from going beyond the Seas at pleasure, and recall them again as he thought fit; and that, as I have said before, without giving any reason: the Books of *Fitzherbert's N. B.* and Register before-cited, makes this evident: Mr. *Attorney* indeed cited many Instances, wherein the Kings had made use of their Prerogatives, as, 7 *Ed. 2. M. 10. Quadregesimo Ed. 3. M. 24. Stat. of 5 R. 2. Cap. 2.* which confirms it, 3. *Inlt. 179. Vicesimo quinto Ed. 3. M. 10.* with many more; and indeed, I think, it was not deny'd, but that after a Prohibition it was an Offence, admitted of by the Defendants Council, for any Subjects to go beyond the Seas; *Dyer* 165. and 296. agrees it.

And that is sufficient for the present purpose, there being a Prohibition in the *Charter*, in question to all Persons that are not there mention'd.

What influence the King's Prerogative must necessarily have upon Foreign Trade and Commerce, appears by his frequent granting Letters of mark and reprizal, these are not allowed of by the Law of Nature, Civil or Common Law; for thereby no man is bound by anothers Act, without his Consent, but by the general Consent of Nations, *humana necessitate exigente.* The King only has the power of making Leagues and Truces with Foreign Princes, upon which only all Foreign Trade does depend, and those Leagues are made upon such Terms and Conditions, and under such limitations, as both Princes think fit; many Instances to this purpose were also cited by Mr. *Attorney*, to which I refer my self, and the differences that arise from Merchants beyond the Seas, are to be determin'd according to those Leagues, and cannot be decided by the Municipal Laws of this Realm, which cannot be put in Execution in Foreign Parts.

The

Roll's Ab.
2. fo. 214.
Commons
pray leave
to export
and import
Foreign
Goods at
their plea-
sure, except
Goods of
the Sta-
ple, not-
withstand-
ing any
Proclama-
tion to the
contrary.
*Resp. le
Roy voet
estre ad-
visé par
son Coun-
sel.*

Fourthly, The King is absolutely Master of War and Peace, which he could not be, in case he had not a Power to lay restraint upon his own Subjects, in relation to Foreign Commerce: Since *eo ipso*, that War is proclaimed, all publick Commerce is prohibited, and the Council that argu'd for the Defendant, admitted, That the King might prohibit his Subjects to go or trade beyond the Seas in cases of Wars or Plagues. How strangely preposterous then would it be for a man to imagine, that the King should have an absolute Power of War and Peace, and yet be deny'd of the means to preserve the one and prevent the other! Is not that therefore the great Reason why the King is at so great Expence in maintaining Ambassadors and Envoys in all the Trading parts of the World, without which, we should be in a perpetual state of War? Would it not be monstrous, that when the King is entered into League with any Sovereign Prince in a matter of Trade, very advantageous to his People, to have it in the power of any one of his Subjects to destroy it? as for instance, Suppose a League between our King and the Emperor of Morocco, for a Trade to *Tangier*, were made upon Condition, that no *English* Ship coming there for Commerce should be above a hundred Tun, and a Fleet of Merchants Ships within that Condition, were in Port at *Tangier*; and Mr. *Sands* with the same Obstinacy, as he seems to appear in this Case, should have gone with a Ship of above a hundred Tun to *Tangier*, that would have been an absolute breach of the League, we should have been immediately in a state of War, the Merchants Goods and Ships absolutely forfeited to the Emperor, by the Law of Nations; and they and their Families thereby undone without any remedy, till Mr. *Sands* should be pleased to return into *England*, and also bring with him an Estate sufficient to make them a Recompence; and then also, perhaps, it would be difficult to contrive such an Action in our Law, to compel Mr. *Sands* to do it: besides, the King has no other way, if his Ambassadors and Ministers in Foreign Parts cannot prevail, that right should be done to his Subjects; or if Mr. *Sands's* Interloping Ship, and all its Cargo, had been wrongfully taken away from him by any Foreign Prince, but by the King's declaring of a War, and compelling them to make Restitution by force; the Consequence whereof will affect more than Foreign Traders would be then concern'd, both in their Persons and Purfes, and it would be very hard for all the King's Subjects to lie under the burden and charge, and the profits and advantages accrue only to a few; and here by the way, I think it not improper to take notice of an Objection, that was made by the Defendant's Council, of the unreasonableness that the King should be entrusted with this Prerogative: For as well as he may restrain Persons travelling to the *Indies*, he may also restrain them from Trading into any other part of the World. The very Objection seems to carry an unfavoury, as well as an unreasonable mistrust in a Subject to his Prince; for as it is a Maxim in our Law, the King cannot be presumed to do wrong; and I am sure the constant Practice of our Present King, has not given us the least umbrage for such Diffidence: and I think I may truly say, we are as safe by our Princes own natural Inclinations, as we can be by any Law in this particular; the King has the absolute Power of pardoning all Offenders, by his inherent Prerogative, which an Act of Parliament cannot deprive him of; the Case of Murther is a full Instance of that, nor

was that Prerogative ever disputed in any Age, tho never so troublesome, saving in that single Case of the Earl of *Danby*, and that without any Reason that I could ever hear of: Is it therefore to be objected, and presumed, that the King will Pardon all the Traytors, Murtherers and Robbers, and other Felons, and make use of his Prerogative to let all Malefactors escape?

The King is the Fountain of Honour, as well as of Justice, and in vertue of that Prerogative, may ennoble as many of his Subjects as he pleases, and thereby exempt them from Arrests, and other common Proceses of the Law, by means whereof Men do more speedily recover their just Debts, and have redress for Injuries. Is it therefore to be presumed the King will make such a glut of Noblemen, because he may do it?

And as this is against his Inclination, so certainly it is against his Interest, to make such Grants as the Defendant's Counsel seems to fear; for it is more for the King's benefit than it can be for his Subjects, the greater the Importation of Foreign Commodities is, for from thence arise his Customs and Impositions, those necessary supports of the Crown; and therefore in some sence the King is the only Person truly concerned in this Question: For this *Island* supported its Inhabitants in many Ages, without any Foreign Trade at all, having in it all things necessary for the Life of Man.

Terra suis contenta bonis, non indiga mercis,

Says the Poet.

And truly, I think, if at this day most of the *East-India* Commodities were absolutely prohibited, tho it might be injurious as to the profit of some few Traders, it would not be so to the generality of the Inhabitants of this Realm. And therefore as I have offered these few Instances to prove the King should have such a Prerogative, in the next place, I come to shew that the Kings of *England* have exercised this their Prerogative in all Ages; and as the King has the power of restraint of Foreign Trade, so he is the only Judge when it is proper to use that power, which seems plainly to be for the same reason: And, I think, Mr. *Williams's* remark of the difficulty of this Case, that it should necessitate the King to call a Parliament to assist him with power to determine this Question, is not to be passed by without some Observation.

God be praised 'tis in the King's power to call and dissolve Parliaments, when and how he pleases, and he is the only Judge of these *Ardua Regni*, that he should think fit to consult with the Parliament about; and Mr. *Williams* would do well to save himself the trouble of advising the King of what things are fit for him to consult with his Parliament about, till such time as he be thereunto called; but it hath been too much practised at this and other Bars in *Westminster-Hall* of late years, to captivate the *Lay Gens*, by lessening the power of the King, and advancing, I had almost said, the Prerogative of the People; and from hence comes the many mischiefs to the King's Subjects in parts abroad, by making the Power of the King thought so inconsiderable, as tho he were a mere Duke of *Venice*, being absolutely dependent upon his Parliament. Would it not be mightily for the Honour and Dignity of the Crown of *England*, think ye, That the Emperor of *Fez* and *Morocco*, or any Prince of the re-

more

more parts of the World should be told, that Mr. *Sands* one of the King of Great Britains Subjects came into the Emperour's Territories against his Prince's consent, and that he had no power to hinder him, unless he would consult with all his Nobles and the Representatives of all his common Subjects to assist therein? Would not the Emperour believe *Sands* to be the greater Prince of the two? But though such sort of Declamations are so much for the service of the Crown, and for the Honour of the Kingdom as they would have it believed; yet I think they have the same tendency of Duty and Service to the King, with some other matters that of late have happened amongst us, *viz.* Some have been so concerned as well for the safety and security of his Majesties sacred Person, and to make him formidable to his rebellious Subjects at home, as to desire that his Guards might be discharged, because it looked as tho he designed to rule by a Standing Army, and to shew their tenderness to his Sacred Life, would have him removed from the assistance of evil Counsellours, as they called them, and put himself into the hands of Assassins, as though one murdered Prince were not sufficient to satisfy that piece of State-policy, in one and the same Age; and in order that he might have sufficient to support the Necessity as well as Dignity of a Crown, which all good Subjects are zealous for; some of late have industriously endeavoured to have prevented him from being able to borrow any Money upon the Credit of any part of his Revenue; a priviledg that the meanest of the Persons concerned in that Question, would think themselves highly injured to be debarred of: These and the like attempts if not prevented, will render the King and his Government low and despicable in all other parts of the World: and as for the instance between a Denizen and a Man Naturalized, I think it rather makes against, than for Mr. *Williams's* Conclusion, as to the main Question; for though the King cannot Naturalize a Man, and thereby give him inheritable blood as a natural born Subject to inherit Lands: yet he may make an Alien a Denizen, and by that means he becomes to have as much priviledg as any of the King's natural Subjects hath, as to Trade and Commerce, which is the onely question now before us; and I cannot help being of Opinion, that this Kingdom was in greater regard abroad, and the Inhabitants thereof more prosperous at home, when the Prerogative of the Crown was more absolute than now it is; therefore it is our Duty as good Judges as well as good Subjects, to endeavour to support it as much as we can by Law. And so I proceed to mention some Presidents and Authorities, whereby the Kings of *England* have in all ages exercised this part of their Prerogative of Restraining, disposing and ordering matters of Commerce and Foreign Trade by Royal Licences, Charters and Dispensations.

And herein I shall content my self with as much brevity as I can, onely in producing some few of those many instances, which were with great care and industry found out by Mr. Attorney, and Mr. Solicitor, and by them so learnedly and properly applied to the Case in question.

I. Therefore it has been well observed, that the Staples which were the common and publick Marts for all Merchants to resort to, were first erected by the King's Prerogative without any Act of Parliament,

as it doth plainly appear by the several Acts of Parliament mentioned at the Bar, either for setting the Places, or enlarging the Commodities that were permitted to be brought to the Staple; for surely in all times when the Staple was fixed in the Dominions of any other Prince, that must be done by League, which none can make but the King. To instance one Authority for all; the Stat. 2 Ed. 3. Cap. 9. expressly says, It is enacted, that the Staples beyond the Seas, and on this side, ordained by Kings in time past, &c. Mr. Attorney and Mr. Solicitor cited several Records and other Acts of Parliaments, that allow this to be the King's Prerogative absolutely, which I shall onely name, they having opened the particulars at large, viz. *Vicesimo E 1. Plac. Parl. Rolls: Abrid. fol. 108. 130. Octavo E 3. numero 20. 27 E. 3. Cap. 1. 43. E. 3. Cap. 1. 47. E. 3. N. 17. Prim. R. 2. N. 98.* with many more, which did not onely Licence Merchants to repair to their several Staples, but prohibited them from carrying their Staple Commodities to any other places; and the several Acts of Parliaments made touching the Staple, onely inflicted greater Forfeitures upon the Persons offending, more than the King by his Prerogative did inflict, but neither added to, or diminished any part of the Power of the Crown: the truth whereof will also farther appear by the consent of the Parliament, plainly declared in several Statutes following, viz. 2 Hen. 5. Cap. 6. 2 Hen. 6. Cap. 4. 8 Hen. 6. Cap. 17. and 27. by which and several other instances, both by Mr. Solicitor and Mr. Attorney, I do conceive it does plainly appear that the Statute of 2 of Ed. 3. Cap. 9. *Nono l. 3. cap. 1. Decimo quarto Ed. 3. cap. 2.* the Stat. of *Decimo quinto, Ed. 3.* mentioned in the Defendants Plea, *Decimo 8. Ed. 3. cap. 3.* which the Defendants Council have so much insisted upon for the opening the Liberty of Trade, onely concerned Merchants of the Staples, and by the Acts of Parliaments made relating to that Trade, since particularly mentioned by Mr. Attorney stand now repealed.

And tho the place of the Staple as well as the Commodities were ascertained by Acts of Parliaments; yet the King granted to Merchants Licences to trade elsewhere, which Prerogative is allowed of by Acts of Parliaments, and other Authorities in our Books: for instance, amongst many others, the Stat. 8 Hen. 6. 21. 22 Hen. 6. cap. 4. 15 Hen. 6. cap. 3. 27 Hen. 6. cap. 1. 1 Hen. 7. fol. 3. A. 13 Ed. 4. fol. 3. l. 5 E. 4. 33. amongst other Books make it appear.

And as well as the King, before those Acts of Parliaments mentioned, ordered the Merchandizes of the Staple, so all other Foreign Trade not taken notice of by Acts of Parliaments, were begun and absolutely disposed of by the King's Prerogative; for as my Lord Coke in his Comment upon *Magna Charta, cap. 30.* does truly observe, that by *Mercatores*, there onely is meant Merchant-strangers; for as I said, I do not find that any of the Subjects of this King meddled in Foreign Trade in many years after the making of that Act: the first instance I meet with, is in *Malin's Lex Mercatoria, fol. 150.* of the Society of Merchants which is the Staples Adventurers, made by a Grant from King Edw. III. and were called the Brotherhood of St. Thomas a Becket of Canterbury till the time of Hen. 7. who confirmed their Charter, but changed their Name to that of Merchant-Adventurers, by which Name they continued a Corporation.

And

And that the King did shut and open Foreign Trade at his pleasure, by many instances mentioned by Mr. Attorney and Mr. Solicitor, does farther appear, 33 Hen. 3. memb. 1. 2 E. 3. pars secunda memb. 35. 3 Hen. 3. N. 33. *Rolls Prerogative* 170. and 214. before-cited, primo Hen. 5. 41. decimo octavo Hen. 6. N. 60. and the Stat. of 12 Hen. 7. cap. 6. which I have caused to be searched; and in *Plowden's Commentaries* in the great Case of Mines-Royal, it is set down as a Rule that ancient Charters and Grants of the Crown are the best Evidences of the Prerogative. *Phil.* and *Mary* erected the Corporation of *Russia* Merchants by Charter, with a Prohibition to others with the like Conditions within mentioned in the Charter at the Bar, and was afterwards approved of in Parliament, in 8 Eliz. and the Forfeiture mentioned in the Letters Patents made more effectual; and as Mr. Attorney did truly observe, that when *Callis* was taken, and thereby the Staples unsettled, Queen *Eliz.* thought according to the President of the *Russia* and other Companies, it was most advantageous for the carrying on of Trade and Foreign Commerce to erect Societies and Corporations, which was well approved of in those times, and so has continued ever since undisturbed until this present Question, which I shall more particularly insist upon when I come to discourse of the next Head.

And here by the way I shall onely remember, that there were many Records and Books cited by the Council at the Bar, to prove the difference between alien Enemies and alien Armies, and how these *Infidels* are in Law look'd upon as perpetual Enemies, and the many Cases that were cited about the *Jews* and others I think will not be necessary to be farther insisted upon; for I conceive they do not concern the Question that is now before us: for were not the Charter now in question in being, it would be worth while for Mr. *Sands* to consider how far he might be obnoxious to punishment for trading with *Infidels*, who are in Law called *Perpetui inimici*, and therefore I conceive it is as Penal for any of the King's Subjects to trade with *Infidels* who are alien Enemies without a Royal Licence, as it is to trade with alien Armies contrary to a Royal Prohibition: and I cannot conjecture how he will avoid this Rock, notwithstanding his pretended skill in Navigation, without making use of this Charter as a safe-conduct to him by Implication, though he seems here so much to struggle against, and how far that would prevail for his benefit may be also considered. But as I said before,

IV. The true Question is, Whether this be a good Grant to the Plaintiffs of a sole Trade to the *Indies*, were the Inhabitants thereof Christians or Infidels exclusive of others, be good or not, is the true Question, and therefore I proceed to the next Step, that though unlawful Engrossing and Monopolies are prohibited by the Laws of this and of other Nations, yet I do conceive that the Charter now in question of a sole Trade exclusive of others, is no such unlawful engrossing or Monopoly, but is supported and encouraged as conducing to publick benefit by the Law, Practice and usage of this and other Countreys: and herein by the way, though the word *Monopoly* or *Engrossing* generally spoken of are odious in the eye of our Law, yet some Engrossings, and so some Monopolies are allowed of in our Books, and so I desire to be understood, when I say a *lawful* or *unlawful Monopoly*, or

a lawful or unlawful Engrossing; and in as much as this is the great, and as I think, the onely Objection that either hath or can be made against the present Charter; I shall be the more particular in giving my Opinion therein, with the Reasons and Authorities that have induced me thereunto.

I premise onely this, that in all those Countreys where Societies of Trade are erected by the Supreme Power exclusive of all others, as the Case at the Bar, Monopolies are forbidden, and are as severely punished by their Laws as they can be by the Common and Statute-Laws of England, viz. in Holland, Germany, France, Spain, &c.

And so where ever the Civil Law prevails, Monopolies are punished with Confiscation of Goods and Banishment, *C. de Monopoliis & Cens. Forens.* part. 1. fol. 497.

Now though Monopolies are forbidden, yet that cannot be understood to be so universally true (as no general Law can ever be) that it should in no respect and upon no occasion or emergency whatsoever admit of any Exception or Limitation.

The Exceptions thereof may be such as these:

I. Though no private Persons can have the sole Trade to themselves by their own private authority; yet this may be granted to a publick Society by the Prerogative of the Prince; if

II. It be upon good cause, and for the publick advantage of the Kingdom.

III. From the necessity of beginning and carrying on such Trades and Forein Commerce, which can be onely done by Companies and Societies.

IV. Such Companies and Societies ought to be continued and supported upon the Natural Equity and Justice, that no other Persons should be permitted either to reap the profit, or to endanger the loss of what hath been begun and been carried on by them with great hazard and expence.

Now in as much as Forein Trade can never be of advantage to this Kingdom, except the ballance be kept equal between this and other Countreys, which can never be done but by keeping up to proportionable Rules, for the regulation thereof with the other Countreys: and because as I said before, the Municipal Laws of this Realm seem too scanty for that purpose, I will therefore first consider how this Question stands as to the Law, of Nations; and then how it is considered by our Law, producing Authorities in both, to make good my Assertion, and because I thought the former more natural and effectual for the decision of this Question, made me more inquisitive than otherwise I should have been. *Cujacius*, lib. 16. *obs.* 23. distinguishes *inter monopolia licita & illicita*.

Licetum Monopolium, says he, *est, si certis personis vel quod potius est certo Collegio concesserit Princeps ut ei soli Jus sit vendendi certa mercis*; and therefore recites a Law of the Emperours *Theodosius*, and *Valentinian*, by which certain Governours of Commerce were appointed, *Editalli Lege sancita, ut nulli mercatori nisi ad designata Loca temporibus præstitutis ad negotiationis sue species distrahendas passim liceret accedere, &c.*

Carpovires in his Decisions before-mentioned, *lib. 2. Decif. 105. N. 13 & 14.* makes this no new Case; *Et certe (non est novum) modum Commercii (quæ tamen liberrima esse debent) poni ex causa nimirum publicæ utilitatis vel Neceffitatis, ex quo monopolia, alias prohibita jure subsistunt.*

And again, *exempla haud rara sunt ubi Neceffitat, & edicto principis monopolia quandoque probari: Commercia ad certas personas & loca restringi videmus.*

Idem Decif. 4. N. 10. & N. 13. Nimirum exercitium ac permissio monopoliorum à principis arbitrio dependet, &c. Scacca de Commercii. Q. 7. fol. 301. N. 15. Hoc non procedit in monopolio, autoritate principis five Reipub. contracto. Quia sicut monopolia, privatâ autoritate contracta Reipub. sunt perniciofa: Ita hæc, quæ legis autoritate, ex iusta contrahuntur causa Reipub. valde utilia sunt.

Grotius de J. B. & P. lib. 2. cap. 12. sect. 16. Monopolia non omnia cum jure naturæ pugnant: Nam possunt interdum à summa potestate permitti, iusta de causa & pretio.

He gives amongst others these two Examples.

I. From the History of *Joseph*, when he was Vice-roy in *Egypt*, Which is, says he, an illustrious instance of this matter.

II. That under the *Romans*, the *Alexandrians* had the sole Trade for all *Indian* and *Ethiopick* Commodities.

So *Thuanus, lib. 32.* gives an instance of a Grant from the *French King, An, 1604.* for the sole Trade into *Canada* or new *France*, for which he gives this reason, *Ne gravis esset ærario ad sublevandos Navigationis illinc institutæ sumptus.*

Which I conceive will go a great way in supporting all such Trading Companies, as cannot be begun but by a publick Expence.

C. de monopolis the Prohibition is expressly limited, *Nisi Privilegium vel alia Consuetudo in utilitatem publicam vergens resistat.*

Mercatura est res indifferens, in qua magistratus, vel in vetando, vel permittendo suam pro Commodo Reipub. potest interponere Autoritatem. Salmaf. de scæn Trapezit. fol. 236. Hoc solum permissum est Regi ut possit prohibere, ne alius vendat salem. Alciat. in Q. inter publica 17. in Fin. F. de verb. Sign. As it is at this day practised in France, Thuan. lib. 5.

Sic in salæ vendens, monopolia etiam hodie in Italiâ licite exerceri, è Superiorum permissione. Scaccha de mercat. part. 4. N. 30.

Sic in Reipub. Lubecensi, certis quibusdam mercatoribus ob prædictas rationes Jus coquendi Sacchari, & salis speciali Privilegio concessum est. Marguard. lib. 4. c. 7. N. 29.

And then as to the Usage.

Hæc est communissima omnium, nullo prorsus reluctantæ Doctõrum sententia, quod jura hujusmodi Emporalia & Regalia possunt acquiri non modo per concessionem summi principis sed etiam Consuetudine & Præscriptione. Lessius de Justitia, lib. 2. c. 22. Dub. 21.

By the Imperial Laws, Commerce and Traffick have received several other limitations; sometimes the Subjects of the Empire have been forbidden to trade to certain places particularly named. And in general by other Constitutions forbidden to export Coin, Gold or Arms to any of the barbarous Nations.

And

And that the Law or Custom of Nations is so, the practice does evince.

And first in Germany, where the Law prohibeth all Monopolies; yet see how the Law there stands in respect of our Case.

Circa Monopolia autem, quæ exercentur adversus Cives, observandum, non esse illicitum, si non cuius quodvis negotiationis genus exercere conceditur, sed illis duntaxat qui ad idem exercendum juxta instituta Civitatis sibi Jus quaesiverunt, quemadmodum in rebus pub. Europæis testis quadam præstitisse oportet eum, qui mercatorium aut opificium aliquod tollere vult.

This as to Corporations.

As to Trading Societies, thus:

Sed & fieri potest, ut à summa potestate Societati mercatorum indulgeatur certum genus Mercium ex certis locis advehere, exclusis reliquis, cujus privilegii concedendi variae possunt esse Cause.

I. Nam Commercia quæ ad loca remotissima instituerentur, priusquam rite stabiliantur, magnos requirunt sumptus & ancipiti eventui initio sunt obnoxia; Ergo Authoribus talium Commerciorum cavendum est, Ne quod ab ipsis constitutum magno cum periculo & sumptu sunt, alii gratis intercipient.

II. Ac præterea ejusmodi Societates privilegiatae opibus suis Reipub. exigente necessitate, felicius possunt quam singula succurrere.

III. Videntur etiam meliori fide Commercia tractari, ac Majorem Copiam Mercium hoc modo posse advehi, neque de tot fraudibus & compendiis cogitare necessum habent, quorum lucrum in commune velut ararium redactum aequalibus portionibus distribuitur.

Puffendorf de Jure Naturæ & Gentium, lib. 5. fol. 655. A learned Author does more at large describe it.

It has been a Question sometimes debated, Whether the Society entred into by the *Hanse Towns* were not against Law: *Quippe quod speciem Monopolii præ se ferre videtur, ut certis locis merces emanet confederati quæ rursus pretio eo, quo volunt, vendant.*

This is the same Objection now made against the Charter at the Bar.

But the Answer given was twofold, and will come home to this Case.

I. That the Emperour *Charles IV.* has given his approbation, and made it lawful by his Authority.

II. That they had continued in possession of this Society so long, that now the length of time (together with the Prince's consent) removed all doubt whatsoever, *Carpsoviæ de Lege Regia Germanorum, cap. 6. sect. 10.* And the Charter now in Question, and other Charters of like nature granted by the Kings of *England*, which I shall have occasion to remember by and by, remained undisturbed without the least interruption as long as this Society did before this Question was stated.

And though according to the Rules of our Laws, such a length of time does not obtain the Credit of a Prescription; yet by the Law of Nations and the practices of all other Countries which are only adapted for this purpose, it is otherwise. *Præscriptio enim tam longi temporis vim legis obtinet, imo tollit omne vitium.*

Præscriptio temporis Immemorialis, quæ privilegiata est, & ex viiioso etiam titulo dominium & jus tribuit, omnesque Solemnitates, etiam extrinsecus, negotio accessisse præsumit tantæ temporis Antiquitas, num. 10. n. Atque omnem Monopolii respectum Consuetudo Immemorialis vel Cæsarum approbatio excludit, n. 10. 26.

Quia Consuetudo Immemorialis Cæsarum scitu & concessu hæc antiqua societas fulcitur omnis Monopolii respectus etiam minimus læserat, Marg. lib. 4. cap. 7. n. 50.

And as these *Hanse Towns* were one of the first Corporations of Trade, I have read of, so was it thought the Interest of *England* to support and encourage them. I find above 60 (some say 80) Towns and Cities united their Stocks, making *Lubeck, Brunswick, Dantzick* and *Cullen*, the chief places of their Residence; and so great was their Trade and Credit under that Constitution, that many Princes granted them large Privileges, and they kept Courts by their Deputies and Councils at *Bergen*.

By the Laws of *Spain*, all Monopolies are forbidden, and under the same Penalties appointed by the Civil Law: Yet there also a right may be acquired to a sole Trade, by Licence obtained from the King, or by Prescription.

Quinta partida Tit. 7. leg. 2. membris hoc commercium Maritimum exclusis cæteris ad 20 annos concederetur.

Neque ulla re se magis prodidit Imperii odium Batavica nostris diebus, (Deo ita volente) constituti magnitudo, & felicitas, quam Navigationum in Indias Orientales susceptarum Constantia & Successus, ad quas ut ærario parceretur Societates institutæ, Cautumque tandem, ut sub unam Societatem omnes coirent, quod aliqui experimento constitisset, Aromatum prætia ab Insulanis ob emptorum Frequentiam augeri & cum alii aliis prævertere & lucrum ad se aliorum damno derivare satagerent, ubi concordia maxima est opus, emulationum & dissidia semina spargi.

I come in the next place to make it appear, that as well as the Law of Nations, and the Practice of all other Countries, warrants the like Grants and Restrictions with the Case at the Bar; so I conceive this Charter of sole Trade to the *Indies*, excluding others, is neither opposed by the Common Law, or prohibited by any Act of Parliament; but is supported by both, as will more evidently appear by the practice and constant usage in all times.

Therefore, tho engrossing be a Crime, odious in the Law, and punishable; yet all manner of engrossing is not.

Therefore in the Case of Foreign Trade, which is only applicable to the Case at the Bar, it was resolved by all the Judges of *England*, 3. *Instit.* 196. That Merchants may buy beyond Sea in gross, and sell here again in gross also; I say, that all Monopolies are not unlawful. Generally speaking they are, and therefore I will admit the Description of an unlawful Monopoly, made by my Lord *Cook*, 3. *Instit.* 181.

A Monopoly, is an Institution or Allowance by the King, by his Grant, Commission or otherwise, to any Person or Persons, Bodies Politick or Corporate, of or for the sole buying, selling, making, working, or using any thing whereby any Person or Persons, Bodies Politick or Corporate, are sought to be restrained of any Freedom or Liberty they had before, or hindred in their lawful Trade.

Now if the Subjects of *England* had not before this Grant, a freedom and liberty to Trade to the *Indies*, against the King's Royal Pleasure, the Charter at the Bar will be no Monopoly within that Rule.

Now that they had no such liberty, hath been sufficiently proved by the several Prohibitions mentioned before, and the many more Instances thereof cited by Mr. *Attorney* and Mr. *Sollicitor*; and it would be very strange, that the King might prohibit Foreigners from coming here into *England*, and not prohibit his own Subjects from going into Foreign Countries.

And it is not denied, but if the King should Proclaim a War with the *Indians*, that then it would be a Prohibition to all his Subjects to have any Commerce with them; nay, and he might continue that War as long as he pleases, and by that means all his Subjects would be as well prevented of any of the Commodities of that Country; and also of exporting any of our Commodities thither: So that surely this Charter, with these Restrictions, is much better than a total Exclusion; and therefore Foreign Trade is not like our home Trade, to which the word Monopolies is properly applicable; for that cannot be totally excluded for any time, tho never so small by any Act of Prerogative.

Object. Ay but, say the Defendant's Counsel, tho the King can by his Prerogative, prohibit all Trade to any Country upon such great Emergencies as War and Plague, &c. yet to grant liberty to some, and exclude others, that makes the Grant at the Bar be thought a Monopoly, which is still begging the Question; for if the King by his Prerogative, have the power of restraining and disposing Foreign Trade, where Acts of Parliament have not interposed, as by the Presidents already cited I conceive clearly he has as inherent to his Crown, and therefore, as he may restrain all, so he may restrain any part by the same parity of Reason.

If the King proclaims a War with any Country, which is a general Prohibition of Trade, and should order, that *John a Styles*, or a dozen or any greater number of his Subjects, &c. and give them Instructions to treat for a Peace, and the Persons so appointed should carry on a Trade, would not Mr. *Sands*, do you think, have as much reason to murmur, that he was none of those Ambassadors, as he has now by being not comprized within the Charters? And would it not be thought an Arrogancy and Sauciness in him to demand an account of the Instruction given by the King to such Ambassadors? or durst he Trade there till a Peace were proclaimed with that Country?

And the gloss upon that Law says *Mercatores non faciant inter Monopolium de re non vendenda nisi pro certo pretio, vel de non exercendo officium nisi per eos recipiatur Officiales & Socios: Possunt tamen hæc facere cum consensu & scientia Regis & contra facientes perpetuo exulabunt, & eorum bona Regi applicantur.*

Ex Privilegio ergo Regis possunt similiter & Consuetudine vel præscriptione, quia quod Privilegio acquiritur, etiam præscriptione acquiri potest.

And there quotes *ubi dicitur, quod potest concedi Privilegium; quod quis solus piscetur in certa parte Maris, & aliàs potest prohibere.*

3. In *France* Monopolies are prohibited also, *Sub pœna Confiscationis corporis & bonorum indict. Const. Fr. 1. Art. 191.*

Notwithstanding which, there are established several Corporations for Trade, I will name but two, *Anno 1657*. The *French King* makes a grant of the sole Fishery in his Dominions to a Society, excluding others upon pain that Interlopers should incur the Penalty *de Confiscation des vaisseaux & Merchantizes & de dix mille Livres d' Amendes*. *Ayrtz.* vol. 4. Pag. 207.

And in the Year 1664. the *East India Company* by his Declaration, with an Exclusion to all others, like our *East India Company*. p. 74, 75.

In the *United Provinces*, the Laws against Monopolies are the same, yet there always were several Trading Corporations exclusive of all others, 3 June 1621. In the Charter of the *Dutch West-India Company*, it is granted thus; And in case any one shall go to or negotiate in any of the aforesaid Places granted to this Company, without consent of the said Company, it shall be upon pain and forfeiture of such Ship and Goods, as shall be found to Trade in those Coasts and Places, which being presently and on all sides on the behalf of the said Company set upon, taken, and as forfeited, shall be and remain to the Use of the said Company. *Ayrtz.* vol. 1. p. 62. *Seff.* 1.

And in case such Ships or Goods be sold, or fly into Lands or Havens, the Riggers and Part-owners thereof shall and may be distrained to the value of the said Ships and Goods.

That the aforesaid Company shall within the said limits make Governors, Officers of War and Justice; and for the other necessary Services for the Preservation of the Places, and maintaining of good Order, Policy and Justice, and the advancement of their Trade, shall appoint, dispose and displace, and substitute others in their Places, as they shall find their Affairs do require.

All Ships coming to any place where the Company have their Garrison and Government, shall not transport thence any Men, Goods or Money, without leave and consent of the Council, upon the pain and forfeiture of six Months wages, &c.

In the Grant to the *Dutch India Company*, 20. Mar. 1602. That no body, of what Quality or Condition soever, shall, for the space of twenty one years pass *Eastwards* of the *Cape of Good Hope*, upon forfeiture of Ships and Goods. *Ayrtz.* 1. vol. fol. 157.

That the said Company may appoint Governours and Offices of War and Justice, and for other necessary Services, for the Preservation of their Places and Maintenance of good Order, Policy and Justice.

The said Officers to take the Oath of Supremacy to the *States General*, and of Fidelity, as to what concerns Trade and Traffick to the Company.

And afterwards, the 9th of Sept. 1606. a *Placaet* was published, That no body, directly or indirectly, shall pass or trade beyond the *Cape of Good Hope*, upon pain of Death and forfeiture of their Ships or Goods, which shall be found to have done or to do so. And tho they should absent themselves out of the *United Provinces*, yet the Sentence shall go on and be decreed and executed, with the present Confiscation, and selling of their Goods, Actions and Credits.

Idem Page 158. And surely the *Dutch* have been always by us esteemed as our greatest and most dangerous Rivals in Trade.

And as for the Reason and Necessity of establishing this way of Trading by Companies, see the Judgment of *Thuanus*, lib. *Hist.* 124. & 130. Where

Where making mention of the *East-Indies*, he saith thus: *Diversis itineribus hujus Regionis Incolarumque Ingeniis cognitis tanta frequentia à privatis hæc ipsa Navigatio & commercium exercitum fuit ut alter alterum fere ivisset perditum.*

Ad obviandum itaque huic malo, visum fuit, An. 1602. quibusdam hujus Navigationis mercatoribus, præpotentum Ordinum consensu certum constituere corpus cujus tantummodo, &c.

The *Indians* being *Infidels* are by Laws esteemed common Enemies, and the Opinion of my Lord *Cook* in *Michelboum's* Case I think therefore to be Law, notwithstanding the Objections that have been made against it, which none of our Books warrant; Now the King by his Charter makes the Plantiffs as it were his Embassadors to concert a Peace, and Mr *Sands* murmurs because he is not one of them.

The King may grant a Fair or Market to every Subject he has, but because he grants that priviledg to some of his Subjects, have the rest any just ground of complaint; because the King may pardon every Offender, but will not pardon any Highway-men now in *Newgate*; must those Goal-birds therefore think themselves injured in their liberty and property? Because the King granted to his Town of *Hull*, that no other Ships should be there freighted for Foreign parts, till the Ships of that Town were first freighted, as he did *Rot. Claus. 41. E. 3. memb. 25.* did *London, Dover*, or any other Town of Trade complain? Would any of these Gentlemen that contend for this liberty of Trade, adventure with their Fortunes to *Algiers*, and when they are seized upon by the *Algierines*, tell them we are English-men, and we have by the common Law of *England*, and many Statutes of our Kingdom, which support the liberty of the Subject, a freedom to trade wherever we please? Or would not they rather say, we have a Pass from the King of *England*, and rely upon that which presumes Treaties, Leagues and Truces between Princes; and in case that will not prevail, the King will see them righted: And in the Charter that is now before us, there is a particular restriction and limitation of Trade to any Prince in Amity with our King.

Now as the constant Usage and practice of other Countries, warrants such Societies as these, so does ours too: for as I said, the *Hanse* Towns were some of the first Corporations of Trade that we read of in History; so was it thought the Interest of *England* to support and encourage them.

K. H. III. gave them great Priviledges and the Still yards for their Residence, which they enjoyed near three hundred years, managing their Trade by an Alderman and Council called *the Guild of the Hanse*, engrossing the Trade of *England* for Grain, Cables, Masts, Pitch, Tar, &c., and under that colour the *Jacobsons* at this day claim several Priviledges.

It is observed by many Historians, that the most flourishing Trades have been begun by united Stocks and Policies.

In this Kingdom a Patent was first obtained for the erecting the Staple, from *E. 3.* before any Act of Parliament intermeddled in that Trade, and proceeded under several Regulations till the time of Queen *Eliz.* In the Book I cited before *Malyns Lex Mercatoria*, fol. 150. says, this

this Company of Merchants are above four hundred years standing, as that Book reckons from 1248. when the said Merchants obtained Priviledges of *John Duke of Brabant*, and were called the Brotherhood of *St. Thomas Becket of Canterbury*, which were confirmed by King *E. 3. H. 4. H. 5. E. 4. H. 6. R. 3. H. 7.* who gave them the Name of *Merchant-Adventurers*, and after him confirmed by *H. 8. E. 6. Q. M. Q. Eliz.* and King *James*, not without many Enemies and Opposers, especially, says that Book of late, taxing them to be Monopolies and unprofitable to the Commonwealth, being that all our Cloaths are not Dressed and Dyed in *England*, yet it still prevailed as being thought for publick good.

And its observable, that *Queen Eliz.* did not only confirm what was done by her Predecessors, but augmented and greatly enlarged the priviledges of this antient Company, and confirmed the Charter on the *Muscovy Company*, granted by *Philip and Mary*, and set up several other Companies, as that of *Exeter* mentioned at the Bar; the *East-India Company*, the *Levant* and the *East-land Company*. And although that antient and beneficial Company of *Staplers* was often opposed by particular Persons, and complained of as a Monopoly intrenching upon the liberty of the Subject in several Parliaments in the time of *H. 4. H. 7. E. 6. and Q. Mary*; yet all parties being heard, these complaints were fully answered, and the Companies priviledges ratified and enlarged.

Again, In *Queen Eliz.* time, the Cloathiers having prevailed against the Company, the Cloathing countreys were almost quickly ruined and reduced to that extremity, that the 29 *Eliz.* the Lords of the Council sent for the Members of that Company, desiring them to reassume their Priviledges, and chearfully to proceed in their Society, with assurance of all Countenance and Assistance from the Government. And in the Reign of King *James*, after several Interlopers had endeavoured to destroy the Company, the King published his Proclamation to restore the Company to its antient Priviledges.

So did King *Charles the First* 7. Dec. 34. Reciting, "Whereas we have taken into our Princely consideration the manifold benefits that redound to this Kingdom; and finding how much Order and Government will conduce to the encrease and advancement of the same; We have thought fit with the advice of our Privy Council, &c. There He gives an establishment to the Company, and prohibits any to intrude upon their priviledges, upon pain of such punishments as the *Star-Chamber* shall inflict.

Since this it may be worth consideration, whether the breaking of this Company has not occasioned the great decay of our Trade in Wool: it being agreeable to reason, that as no Law can be effectual without Courts of Justice to put them in execution, nor a stragling Army subsist without Discipline: so a stragling Trade managed by particular persons, whilst every one strives to advance his own private Interest, will ruine the Trade in general, especially such a hazardous Trade as this to the *East-Indies*, which already hath been so chargeable, and can onely be prevented by the Conduct and Government of a publick Society: and surely to look after and settle these matters, properly belongs to the care and prudence of our Governours.

Now I shall observe how the practice has been both in Queen *Elizabeth's* time and ever since, and that although many Charters like ours at the Bar have been granted, and none ever demanded by any Judgment in *Westminster-Hall*, or so much as objected against, save onely that of the *Canary Patent*, till this Cause at the Bar, and tho several attempts have been made both in Parliament and in the Courts at *Westminster-Hall* against Monopolies; yet this Charter and others of the like nature were never look'd upon under that Character: for instance,

I. A Charter was granted 2. of *Eliz.* to the Merchants of *Exeter* for the sole Trade of *France*, excluding all other Merchants of *Exeter* not of that Company, continued undisturbed, and prevailed against a great opposition that was made against it in Parliament. King *Edward VI.* and King *Philip* and *Mary*, having granted a Charter like ours to the *Russia Company*, which continued in peace till the 8. of the Queen, when the Parliament taking notice of that Patent, thought fit to confirm it with all the commendations imaginable, and was so far from thinking it a Monopoly, that it says, the Commonwealth before that time had received great advantages by it, and grants, and inflicts greater and other Penalties than were or could be inflicted by the Letters Patents; and it is observable, that there were some Interlopers upon that Trade in those days, and had been liable to the Forfeitures inflicted by those Letters Patents, and were therefore forced to apply themselves to that Parliament, and did obtain a special Proviso to excuse those Forfeitures, which had not that Act of Parliament been made, they had been liable to, which I take to be an Authority full as to the case at the Bar.

Queen *Elizabeth* during her Reign granted several Charters of the like nature, which pass'd the perusal of her Attorney and Solicitor, learned Men in our Profession. In the beginning of her Reign my Lord Chief Baron *Weston* was Solicitor, Sir *Gilbert Gerrard* Attorney General, and pass'd those Patents both to the *Russia* and *Exeter Companies*: 23 *Eliz.* my Lord Chief Justice *Popham* was Attorney, and Lord Chancellour *Egerton* Solicitor, in whose times some few such Charters were also granted like to this at the Bar: and then my Lord *Cook* was Attorney General, and my Lord Chief Baron *Flemming* Solicitor General, who approved thereof; and it is observable, that in the 43 and 44 of the Queen, the Parliament took notice of many Patents of Monopolies, as it appears by the Books cited at the Bar. *Townsend's Collections* 244 and 245. the Parliament seem'd to be as high as ever they were in any Age before, and particularly were incens'd by those Patents: a list of all were brought in by Mr. Secretary *Cecil*, that were thought grievous or prejudicial to the Commonwealth; and though there were a Catalogue of forty or fifty, amongst whom that of *Darcy* is one; yet the Parliament nor none other complain'd of any Charter granted to Corporations, but they continued undisturbed. And by the way 'tis not amiss to observe, that *Darcy's Patent* was not immediately damned in Parliament, but referred to take its fate in *Westminster-Hall*; the great reason that guided that Judgment was the restraint that was put upon the Home-Trade; and so it appears in *More's Reports* 672. and thus stood these Charters; the *China Charter*, the

Turky Company, the *Barbary Company*, the *Guiny Company*, all Charters of sole Trade, excluding others, remained in Trade during all *Queen Elizabeths* time.

But in the third year of King *James* was the first Act made for opening a general Trade to *Spain*, *Portugal* and *France*, to all the King's Subjects, which could not be done in *Westminster-Hall*, as appears by the Preamble to that Act; nor does that Act call those Charters Monopolies, or open a free Trade to any other parts of the World, but leaves all Charters of Forein Trade, save to *Spain*, *Portugal* and *France*, to remain as they did before. And in the 4. *Jac. cap. 9.* there is notice taken particularly of the Charter granted to the *Exeter Merchants* of the sole Trade to *France*, and because it was thought to be damned by the general words of that Statute *D. 3.* yet it is there enacted and declared that the said Statute of Patents neither did or should dissolve, annihilate, or impeach the said Charter, or the said Company in any of their Priviledges, Liberties, or Immunities granted unto them by the said Charter, any thing contained in that general Act to the contrary notwithstanding; and from this Act of Parliament. I observe two things:

I. That the Parliament thought that the Charter to *Exeter* for sole Trade to *France*, exclusive of others, was for the publick benefit and weal of that City.

II. That the Letters Patents were good in Law, and did not want the assistance of an Act of Parliament to support them; for that Act does not confirm those Letters Patents, but provides onely that the Statute 3. *Jac.* should not by general words be thought to Impeach or destroy them. Now had the Parliament thought the Charter void or infirm, they might have confirmed or strengthened it as the *Russia* Patent was; but they concluded, that had it not been for the Statute of *tertio*, the Charter was good to all intents and purposes: and this I take to be a full Authority in the Case at the Bar. But to proceed, the *Greenland* Patent for sole Fishing exclusive of others granted by *Queen Eliz.* is held good, *Rolls* part. 5. fol. 3. *Taylor of Ipswich* his Case, and the Case of the Abbot of *Westminster*, is agreed to be Law in *Darcy's Case*, *Moor* 673. by Mr. Justice *Doderidge*; and by the way, he gives good Advice to all Persons that dispute the King's Prerogative; and for the friendship I bear to Mr. *Sands* and others that are now in Court, and I think need the Advice, I shall read the very words of the Book, He that hews above his Hands Chips will fall into his Eyes: *Et qui majestatem scrutatur principis opprimetur splendore ejus.*

In King *James's* time many Grants like ours were made, but particularly in 7. *Jac.* the Patent granted to the *East-India Company* by *Queen Eliz.* was the advice of all her Council, as well as by my Lord *Hubbard* then Attorney General, and Sir *Francis Bacon* Solicitor General, confirmed and allowed, with the same clauses as the Charter at the Bar, and so remained undisturbed and uninterrupted all King *James's* Reign, and was not thought to be any whit touched or aimed at by the Proviso in the Statute 43 *Eliz. cap. 1. sect. 9.* that Act only pointing at the Monopoly Patents complained of in that Parliament of 43 of the *Queen*, which I mentioned before: Then comes the Statute so much insisted on by the Defendants Council, commonly called the

Statute

Statute of Monopolies, Stat. 21 Jac. cap. 3. which certainly doth not at all affect the Case at the Bar. For first, this Charter is not a general Grant for the sole *buying, selling, making, using* of any thing within this Realm, which are the very words of the Acts: nor does this Charter give the *East-India* Company, licence or toleration to *do, use, or exercise* any thing against the tenour or purport of any Law or Statute, which are the onely things provided against by that by-Act. But the Parliament then seemed to take the same general care of all such Charters as this at the Bar, as the Parliament did in 3. *Jacob.* of that particular Charter of *Exeter*; and therefore to the end that those words in the beginning of this Act of Monopolies might not be thought to extend to Charters to Corporations for Trade; there is a Proviso, *sect. 9.* That that Act shall not extend to any *Corporations, Companies, or Fellowships, &c.* erected for the maintenance, enlargement or ordering any Trade or Merchandize, but leaves the same as they were before that Act without any Immutation: and it is observable, that the Parliament then thought a General Saving sufficient to support those Charters that were then in being, to Corporations for Trade and Merchandize, but made particular Proviso's for the saving of Patents for Inland Commodities, *viz.* such as Salt, Gunpowder, Ordinance, Shot, and the like.

So that this Company was in full possession of their priviledge of sole Trade, exclusive of others, all King *James*, and K. *Charles* the first his time, till all the Prerogatives of the Crown were invaded, and the crowned Head too was taken off by Traytors and Rebels, but the Providence of God having restored us our King, and reinvested him with all his undoubted Prerogatives, as well as restored us to our antient Rights and Priviledges, and scarce, as I may say, warm in his Throne; but amongst the other considerations that he had for the publick weal of his Subjects, he considers the publick advantage of this Kingdom arising by Trade, and amongst them one of his first thoughts are fix'd upon this Company: for the third of *April*, 1661. He by his Letters Patents taking notice of the Charters of Queen *Elizabeth* and King *James*, granted to the *East-India* Company, and of the injuries that were done to them by the late Troubles, with the advice of his Council, and approbation of Mr. Attorney *Palmer* and my Lord Chancellour *Finch*, he granted and confirmed to them all their priviledges. The 27th of *May* in the 20th of his Reign, Lord Chancellour *Finch* being Attorney, and my Lord Keeper that now is Solicitor, he confirms this Charter, and grants to the *East-India* Company other priviledges by an other Charter in the 28th year of his Reign; at which time the Lord Keeper was Attorney, and Sir *William Jones* Solicitor: he confirms the former, and grants more priviledges: and in the 25th year of his Reign by the Charter now in question, passed with the approbation of the present Attorney and Solicitor, Men of great Ability in their Professions, and of whom, were they not present, I should say much more, the Charter to this Company was confirm'd with additional Priviledges.

Nor has this Charter passed only the approbation of his Majesty and Council since his happy Restauration, but the Parliament has likewise taken notice of it; the Statute 14 *Car. 2. cap. 24.* takes notice of it,

to be of great advantage to the Publick. The Stat. of the 29th of this King for Pole-money, Taxes them at twenty shillings for every hundred Pound in stock ; in the great Case between *Skinner* and the *East-India* Company, the House of Commons defended them, even to an eruption between the two Houses.

Mr. *Jenks* and some other Linnen-Drapers and Tradesmen of *London*, taking the advantage of the Heats that too frequently possessed the House of Commons of late years, especially against the Point of Prerogative, did furiously attack the *East-India* Company, but without any success ; and this Company was never assaulted in *Westminster* Hall till this Case at the Bar ; I cannot help therefore this Observation, that as the King by his Charter 1661. takes notice, that the Charters granted by Queen *Elizabeth* and King *James* remain uninterrupted till the late Rebellion ; so the Interlopers against the King's Prerogative in this particular, and the horrid Conspirators against the King's Life in this last hellish Conspiracy, first appeared in *Westminster-Hall* about the same time.

As to the Objections I have not yet given answer to, I think they are but few : my Lord *Cokes* Opinion cited by Mr. *Pollexfen*, 2 *Instit.* 540. where my Lord observes new things which with fair pretences prove hurtful to the Commonwealth ; and amongst them reckons that new Corporations trading into Foreign parts and at home, which under the fair pretences of Order and Government, in conclusion tend to the hindrance of Trade and Traffick, and in the end produce Monopolies, does not at all concern the Case at the Bar ; for this Charter that hath continued for one hundred years without any interruption till of late, can neither be thought a new Corporation, or hindrance of Trade ; and Sir *Edward Coke* when he was Attorney General, and past this Charter, was as learned in the Law as he was when he published that Book, and was turned out of being Chief Justice, did not think this Charter needed that Caution.

As to the Case of the *Canary* Patent between *Horn* and *Ivy*, that cannot affect the Case at the Bar.

I. For first, The Judgment in that Case was given upon the point of Pleading, and not upon the validity of the Patent.

II. That Patent was in perfect opposition to that Statute 3. *Jac.* that opened a free Trade to *Spain*, and therefore could not be restrained by the King's Letters Patents, but there is no such Objection to our Case.

The Council that argued for the Defendant seemed to allow the Charters to the *Virginia*, *Turkey*, and *Eastland* Companies, which are exclusive of others, to be good, because they're managed by a Regulation and not a Joint stock, which surely can make no difference ; for it is a Grant of a sole Trade to them exclusive of others as well as the Case at the Bar, and it's as hard to get into the *Turky* Company as it is into this, and may be more chargeable : for you cannot be a Member of the *Turky* Company, but you must be a Freeman of the City of *London*, and makes you liable to all the great Offices of Charge in that Government, but a Freedom of the *East-India* Company may be purchased at a much easier rate ; the Members of the *East-India* Company are as visible as those of the *Turkie* : and though it was said, the

East-India Company were sometimes invisible, yet were the *Turky* Company infected with so many Interlopers as the *East-India* Company have, they would not appear so glorious and spendid as they now do, and as I heartily wish they may long continue. But the King by this Charter has reserved to himself a Power to destroy and alter the whole Charter, or any part thereof, so as to put it into a way of Regulation instead of a Joint-stock, in such manner as he shall in his great Wisdom think fit; therefore it becomes us in Duty and Modesty to wait till we receive his further Royal Pleasure therein. And whereas it was objected at the Bar, because the King cannot lay any Imposition upon Foreign Trade, therefore he cannot restrain it:

I do not know to what end that Objection was made, because it does not affect the Question at the Bar; but lest it may obtain the effect that I presume was aimed at, I think not amiss to say, that even at this day there is much more may be said in the maintenance of the King's Prerogative in *Westminster-Hall*, in that Case, than can be offered against his Prerogative in this; but in as much as that and several other Objections against the Charter proceeded from unreasonable as well as unmannerly mistrusts they have of the Crown; I cannot but remember that his Sacred Majesty was not so mistrustful of them; for he since his Restauration has bestowed upon his Subjects more than all his Predecessors, put them all together since the Conquest ever did. Nay, he in a moment frankly bestowed upon us more than ever he desires he shall be trusted with again; for by his Act of Indemnity he bestowed upon his Subjects their Lives, Liberties and Estates which were all justly and legally forfeited to him by the late Rebellion, the consideration whereof will prevent all fears and jealousies, and promote in all Loyal hearts a firm resolution to sacrifice their Lives and Fortunes, so freely bestowed upon us by him, to maintain the Crown and just Prerogatives thereof, so that it may have a perpetual continuance in that Royal Family in a lawful Succession, which I heartily pray may be so long as the Sun and Moon endures.

From what hath been said, I hope it doth plainly appear, that since the Law of this Land and the Law of Nature and Nations, allow the Power of making Companies to manage Traffick, exclusive to all others to be in the Prince; That this is reckoned to be *inter Jura regalia*; That no Act of Parliament does restrain this Prerogative; That the practice of all *Europe* has been accordingly; That particularly such Companies have been erected in *England*, and those Companies have been in quiet possession of their Priviledges, for such a number of years; That they have passed the approbation of so many learned Men; That they have been thought for the publick advantage of the Nation, by so many Kings and Princes, with the advice of their Council both in and out of Parliament; That all Statutes and Authorities of Law that we can meet with in our Books affirm it, and none that I can meet with oppose it.

That the *East-India* Company have solely run the hazard, and been at great Expences;

In discovering Places,
Erecting Forts, and keeping Forces,
Settling Factories,

And making Leagues and Treaties abroad,

It would be against natural Justice and Equity (which no Municipal Law can take away) for others to reap the benefit and advantage of all this.

Especially since all this has been occasioned by an Act of the Publick, and by the just Prerogative of the Crown under which they claim.

So that now supposing the matter had been doubtful at the beginning (as yet the contrary is evident) yet after so many years undisputed, and uninterrupted Prerogative of the King, and the possession of the Companies pursuant therunto; and yet the Laws having always been open to any Subjects who conceive themselves grieved, that Speech which *Josephus* records of King *Agrippa* to those *Jews*, who after many years endeavoured to recover their lost pretence, may be applied to these clamorous Interlopers.

Intempestivum est nunc libertatem concupiscere, olim ne amitteretur certatum oportuit. Non amantes libertatis dicendi estis, sed subditi contumaces.

And so the *Romans* answered *Antiochus* (to shew the injustice of his Demands) That he required those Cities which his Predecessor for so many years had never enjoyed.

And Queen *Elizabeth* pleaded against the King of *Denmark* for the rights of Fishing upon the coasts of *Norway* and *New-Island*, That neither his Great Grandfather, Grandfather nor Father, had exacted any thing for it, and therefore concluded it to be unjust.

Cambden Eliz. sub Anno 1600.

So that I conclude the First, and as I conceive the onely Point in this Case, that Letters Patents that give Licence and Liberty to the Plaintiffs to exercise the sole Trade to the *Indies* within the limits of their Grant, exclusive of all others, is a good Grant in Law.

II. I do conceive that the Defendant trading to the *Indies* contrary to this Charter, may be punished by Information at the Suit of the King, and that this Action by the Plaintiffs is also well brought; but in as much as I have detained you so long upon the first Point, I shall trespass upon your patience but a few words to this.

I. Therefore, I conceive the Plaintiff need not alledg any special Damage, no more than the Grantee of a Fair, Market, or any other Franchise.

II. The Action is brought, and grounded upon the Grant of the sole and intire Trade, which, as I conceive is a Franchise the King may grant, and is like the Case of New Inventions, upon which Letters Patents, Actions are brought by every days experience, and the prohibiting Clause is added onely to make the thing more notorious; and that Interlopers in case they should be prosecuted at the King's Suit, should be more inexcusable, and until you can imagine there may be as many *East-India* Companies as there are Commoners and School-Masters in *England*, *Mary's Case*, *Cook* 9. can never be thought an Objection. As to the Objection in the 11 *Rep.* 88. *Rolls* Abridgment, part.

part. 106. *Darcy's Case*, that admitting the Grant or Dispensation to *Darcy* had been good for the sole importing of Foreign Cards: yet that being onely a Dispensation to the Stat. of E. 4. and did only exclude *Darcy* from the penalty of that Act, he could not maintain the Action; but if in case that Grant had vested an Interest, as our Grant at the Bar does, he might have brought an Action, as my Lord *Rolls* says in the next Paragraph, may be collected out of *Darcy's Case*.

The Case upon Patents of new Inventions are full Authorities in the Case at the Bar; and so is that Case of the Abbot of *Westminster*, *Re.* fol. 107. Wherein upon the Grant of the Market for thirty days, exclusive of others, is particularly set forth in the Action; and the *Salisbury* man that brought *Cloth* to *London*, and sold the same contrary to that Charter, is prosecuted in an Action of Trespass upon the Case, at the Suit of the Abbot, and the Writ concludes (supposing the Grant good) *in nostri contemptum & predicti Abbatis grave damnum ac Fr. & libertatum suarum predictarum lesionem manifestam*, which is an Authority full as to this Point.

Upon the whole matter I am of the same Opinion with my Brothers, and do conceive that that Grant to the Plaintiffs of the Sole Trade to the *Indies*, exclusive of others, is a good Grant, and that the Action is well brought: and therefore let the Plaintiff take his Judgment.

F I N I S.